

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001**

Appeal by ANC6B

BZA Appeal No. 20549

**D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS’S
OPPOSITION TO APPELLANT’S MOTION TO STAY THE ISSUANCE OF
CERTIFICATE OF OCCUPANCY**

NOW COMES, D.C. Department of Consumer and Regulatory Affairs (“DCRA”) and for its *Opposition to Appellant’s Motion to Stay the Issuance of Certificate of Occupancy*, states as follows:

Appellant Advisory Neighborhood Commission 6B (“ANC” or “Appellant”) filed a Motion asking the Board of Zoning Adjustment (the “Board” or “BZA”) to stay DCRA from issuing a certificate of occupancy (“C of O”) for a property at 1323 E Street SE.¹ However, the Board must deny the Motion as: 1) Appellant’s Motion is moot because the C of O has already been issued; and 2) the Appellant has not met its burden in demonstrating that a stay is warranted. For the reasons stated herein, DCRA asks that the Board deny the Motion.

I. Appellant’s Motion to Stay is Moot as a Certificate of Occupancy Has Been Issued for the Property.

The Appellant Motion seeks to “stay the issuance of a Certificate of Occupancy until the case is decided on the merits.”² However, a C of O has already been issued for the property. *See*, CO2102980 attached hereto as Exhibit A. The BZA’s General Provisions prohibit it from considering “moot” questions. *See*, 11 DCMR Subtitle Y § 101.6. As noted by the D.C. Court of

¹ BZA Appeal 20549 – Exhibit 39, Motion to Stay Issuance of Certificate of Occupancy at 1323 E Street SE (“App. Mot.”).

² BZA Appeal 20549 – Exhibit 39, App. Mot., p.5.

Appeals: “[a] case is moot when the legal issues presented are no longer ‘live.’” *Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004). Moreover, the BZA has also dismissed cases for mootness. *See, e.g., BZA Appeal No. 17980 of William J. Reaves* (2010) (appeal of permit rendered moot where revised plans depicted building with conforming side yard); *BZA Appeal No. 16984 of ANC2A* (2004) (appeal challenging portion of permit approving expansion rendered moot when renovation approved under revised permit which eliminated expansion). That same standard applies here. Since a C of O has been issued for the property, the Appellant’s Motion is moot and the Board must deny it.

II. The Appellant Has Not demonstrated that it has Met the Four (4) Prong Factors for the Board to issue A Stay of the C of O.

To the extent that the Appellant seeks to alternatively stay the occupancy of the premises, the Appellant has failed to carry its burden in satisfying the elements justifying such a stay. A stay may be granted only upon the Board’s finding that: (a) the party seeking the stay is likely to prevail on the merits of the appeal; (b) irreparable injury will result if the stay is denied; (c) opposing parties will not be harmed by the stay; and (d) the public interest favors the granting of the stay. *See*, 11 DCMR Subtitle Y § 701.3; *see also, BZA Appeal No. 16701-C of Foggy Bottom* (outlining the four prong test for stays). However, the Appellant fails to meet any of the prongs, and its Motion must be denied.

A. The Appellant has not Demonstrated it is Likely to Succeed on the Appeal.

The Appellant states, in a conclusory fashion, that it is likely to succeed on this appeal. However, the Appellant offers no substantive evidence to support its claims. Neither the Appeal nor the Motion, are supported by a sworn affidavit from a design professional, or a zoning expert

concluding that the Zoning Administrator erred. The Appellant merely offers a flurry of allegations founded solely on its own supported interpretation of the zoning regulations.

For example, in its Motion, the Appellant claims: “. . .the prior owners [of the property] made material representations regarding the loading berth.”³ However, the Appellant provides no support for this allegation, nor does it demonstrate how this is even relevant to any issue in this appeal. Moreover, the ANC fails to offer a single BZA decision or case which supports any of its zoning interpretations. Of particular note, the Appellant argues: “. . .there is no way for a lawfully non conforming parking space or loading zone to exist in a building built after the adoption of ZR-58.”⁴ However, Appellant offers no substantive legal support for this sweeping claim. It is apparent that Appellant’s hollow arguments are insufficient to demonstrate it will prevail on this appeal.

B. The Appellant has not Demonstrated Irreparable Injury.

The Appellant claims irreparable injury absent the stay because recent activity at the property has allegedly caused vehicles to double park and a garbage truck to block a bike lane.⁵ However, that alleged activity—albeit inconvenient—occurs in many areas of the District, and in countless metropolitan areas. Such activity does not constitute an “irreparable injury,” but rather a temporary occurrence. Furthermore, the Appellant is free to contact District agencies (DDOT/DPW/DCRA) to investigate the property to enforce the parking and/or refuse regulations. In this instance, the Appellant cannot carry its burden in demonstrating irreparable injury.

C. A Stay will Harm the DCRA, the Property Owner, and Door Dash.

Appellants claim that DCRA, the property owner (E Street Phoenix, LLC, and DoorDash Essentials LLC d/b/a DashMart (“DoorDash”)) will not be harmed by a stay as the hearing is set

³ BZA Appeal 20549 – Exhibit 39, App. Mot., p.4.

⁴ BZA Appeal 20549 – Exhibit 39, App. Mot., p.4.

⁵ BZA Appeal 20549 – Exhibit 39, App. Mot., p.4

for December 1, 2021.⁶ However, a stay of the C of O would cause economic harm to the property owner and DoorDash, as the BZA’s final order may not be issued for months after the December hearing, excluding any motions and/or appeals. DCRA will suffer harm as a stay, in this case, is without legal justification—which infringes on DCRA’s authority in issuing the C of O.

D. The Appellant has not Demonstrated that a Stay is in the Public Interest.

Appellant argues that the stay is in the public interest to “ensure consistent interpretations of the zoning regulations.”⁷ However, the Appellant has filed this action challenging the Zoning Administrator’s decision regarding issued *building permits*--not the C of O. The Board will determine whether or not the Zoning Administrator erred in his determination. It is against the public interest and due process to arbitrarily stay an issued C of O when a litigant has appealed the building permit(s), which is the first writing. *See*, Subtitle Y §302.5.⁸

For the foregoing reasons, DCRA prays that the Board deny the Appellant’s Motion.

Respectfully submitted,
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Date: 9/23/21

/s/ Hugh J. Green
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⁶ BZA Appeal 20549 – Exhibit 39, App. Mot., p.5.

⁷ BZA Appeal 20549 – Exhibit 39, App. Mot., p.5.

⁸ Y §302.5 states: A zoning appeal may only be taken from the first writing that reflects the administrative decision complained of to which the appellant had notice. **No subsequent document, including a building permit or certificate of occupancy, may be appealed** unless the document modifies or reverses the original decision or reflects a new decision (emphasis added).

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C of O

CERTIFICATE OF OCCUPANCY

Exhibit A

PERMIT NO. **CO2102980**



Issued Date: **08/23/2021**

Address: 1323 E ST SE		Zone: PDR-1	Ward: 6	Square: 1043	Suffix:	Lot: 0166
Description of Occupancy: RETAIL-PREPACKAGED FOOD AND BEVERAGES ONLY (ASSOCIATED PERMITS B2103902, B2109853, B2112156)						
Permission Is Hereby Granted To: DOORDASH ESSENTIAL LLC		Trading As: DASHMART	Floor(s) Occupied 1ST	Occupant Load: No. of Seats		
Property Owner: E STREET PHONIX LLC		Address: 409 4TH ST SE WASHINGTON, DC 20003	BZA/PUD Number:	Occupied Sq. Footage: 5790 PERMIT FEE: \$87.08		
Building Permit Number (if applicable) B2103902	Type of Application:	Approved Building Code Use Storage Foods - S-2: Approved Zoning Code Use Approved Zoning General Use				
Conditions/ Restrictions: THIS CERTIFICATE MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS MAIN ENTRANCE, EXCEPT PLACES OF RELIGIOUS ASSEMBLY. Use complies w DCMR Title 11 (Zoning) and Title 12 (Construction). As a condition precedent to the issuance of this Certificate, the owner agrees to conform with all conditions set forth herein, and to maintain the use authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all spaces whose use is authorized by this Certificate and to require any changes which may be necessary to ensure compliance with all the applicable regulations of the District of Columbia.						
Director: Ernest Chrappah <i>Ernest Chrappah</i>		Permit Clerk Nicole Rogers		Expiration Date:		
9/22/2021 TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639						

CERTIFICATE OF SERVICE

I certify that on this September 23, 2021, a copy of the foregoing was served via electronic mail to:

Advisory Neighborhood Commission 6B
c/o Commissioner Corey Holman
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Appellant

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